No. 623.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

DISTRICT OF COLUMBIA, *Petitioner*,

v.

ALPHONSE J. VIGNAU AND JOSEPHINE VIGNAU, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATEMENT OF CASE.

Margaret McCathran filed her complaint in the District Court charging that the petitioner, or the Sanitary Grocery Company, or the respondents, or one or more of them, negligently installed and/or maintained a sidewalk adjacent to premises 4801 Georgia Avenue with a dangerous obstruction therein, over which she tripped and was injured.

The petitioner denied that it installed or maintained the sidewalk as alleged (R. 5).

The respondents (R. 10) and the Sanitary Grocery Company denied that either of them installed or maintained the walk.

The petitioner also filed a cross-complaint against the Sanitary Grocery Company and the respondents in which

it alleged that one or the other of the cross-defendants installed the walk and negligently left a stop-cock box above the level thereof, and so maintained the walk until the date of the accident.

The respondents (R. 11) and the Sanitary Grocery Company denied the allegations of the cross-complaint as to the installation and maintenance of the walk and stop-cock box.

Neither the sufficiency nor propriety of the cross-complaint as a pleading was questioned by the cross-defendants.

At the close of the testimony of the plaintiff and that of the petitioner in support of its cross-complaint, the respondents and the Sanitary Grocery Company moved for instructions in their favor on the ground that the evidence was insufficient to sustain verdicts against either of them. These motions were granted.

The record discloses that at the close of the entire case the petitioner did not request a directed or special verdict on either or both of the issues presented, as authorized by Rule 49 Federal Rules of Civil Procedure, but permitted the submission of the cause to the jury on the questions of negligent installation and/or maintenance presented by the complaint and petitioner's answer. The jury returned a general verdict in favor of the plaintiff on which judgment was entered.

The petitioner did not appeal from the judgments for the plaintiff and the Sanitary Grocery Company, but only from that in favor of the respondents.

Therefore, the question presented on appeal was whether the petitioner had so sustained the burden of establishing the allegations of its cross-complaint as to require the submission to the jury of the question whether the respondents were guilty of the negligence charged.

The court below agreed with the trial court that the petitioner had not sustained the burden of proof and affirmed the judgment.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

1. No question of general public interest is involved.

2. No conflict is shown with the decisions of this Court or of any Circuit Court of Appeals.

3. The question presented calls for review and appraisal of the evidence.

4. The decision concurred in by both courts below will not be reviewed here unless clearly wrong.

5. The issues of its negligent installation and maintenance were both submitted to the jury by the petitioner and a general verdict returned. Under such circumstances, the petitioner may not here assert that there was insufficient evidence to justify a finding against it on either or both of these issues.

ARGUMENT.

1. The petitioner contends that the court below construed Rules 8(c) and 20(a) of the Federal Rules of Civil Procedure in conflict with decisions of the Circuit Courts of Appeal.

The record shows that neither the sufficiency nor propriety of the cross-complaint, as a pleading, was questioned by the cross-defendants. The decisions of the courts below were not based upon any defect in petitioner's pleadings, but, on the contrary, were placed on the ground that the petitioner had failed to establish the allegations of its cross-complaint that the respondents had installed the paving and stop-cock box. The petitioner contended that the evidence clearly established that the respondents installed the paving and stop-cock box ten years before the accident, and that the finding of liability against it was based solely upon its failure to keep the streets in a reasonably safe condition. It was in answer of those contentions that the court below said that they found no support either in peti-

tioner's pleadings, the evidence or the verdict of the jury; and it pointed out the inconsistencies between such claims and the pleadings and verdict.

2, 3, 4. No conflict of decisions is presented. The cases cited by the petitioner on this point merely hold that a pleading conforming to the provisions of the Federal Rules of Civil Procedure is sufficient. No question as to the sufficiency of the petitioner's cross-complaint was raised. The comments of the court below regarding the pleading were, as above stated, made in support of its ruling that petitioner had not sustained the burden of proof resting upon it.

There was no direct evidence that the District did not itself pave the parking space, but there was evidence from which the jury could have found that either the District or the Sanitary Grocery did so.

In support of its conclusion the court below cited and followed the decision of this Court in *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333, 339, 340 (R. 126).

This Court does not grant certiorari for the purpose of reviewing evidence, particularly where the challenged decision has been concurred in by both lower courts.

> *Houston Oil Company of Texas* v. *Goodrich*, 245 U. S. 440, 441; 62 L. ed. 385.
> *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178; 82 L. ed. 1273, 1275.

5. Having submitted generally to the jury the issues of its negligent installation and maintenance, and the jury having returned a general verdict against it, the petitioner may not now assert that there was insufficient evidence to justify a finding against it on either or both of those issues.

The cases of *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, *Way* v. *Efdimis*, 66 App. D. C. 92, and *Security Savings and Commercial Bank* v. *Sullivan*, 49 App. D. C. 119, relied upon by petitioner, were all cases wherein the abutting property owners or others were mak-

ing use of the public walk for their exclusive benefit by installing therein devices such as cellar doors, skylights and gas appliances. Here the stock-cock box was not for the exclusive use or benefit of the respondents and they had no control over it.

In *Dotey* v. *District of Columbia*, 25 App. D. C. 232, 236, a case involving a water stop-cock box, the court said:

> Then, as to these water plugs, they were put down by the municipality, and the adjacent owner has no control over them, and no right to interfere in any manner with them, except by permission of the municipal authorities; and whether they are placed in the main sidewalk or in the portion of the sidewalk leading to the house, if they are placed in either, it is the duty of the municipal authorities to see that they do not become dangerous obstructions to those having occasion to use the sidewalks.

It is respectfully submitted that the petition for certiorari should be denied.

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